BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

Certiorari is sought to review an opinion by the United States Circuit Court of Appeals for the Tenth Circuit, not yet officially reported, which is set forth (R. 104-109) wherein said court affirmed a decree of the United States District Court for the Northern District of Oklahoma, entered without opinion. The decree appears (R. 39-42). The facts sufficient appear in petition for writ (pages 1-10).

The important question is not whether the United States or its Indian wards may pursue and have adjudicated the force and effect of the instrument demoninated a "release" (R. 16-17) or have adjudicated the question of whether petitioner has any further interest in land or personal property inherited by her from her deceased husband and title quieted against her, but whether the United States or its wards may pursue said right in the Federal courts of Oklahoma rather than in the state courts, as no federal question is involved and no diversity of citizenship exists.

The restrictions against bringing of local disputes in federal courts between individuals of the same state cannot be circumvented. *(City of Indianapolis* v. *Chase National Bank,* 314 U. S. 63-76, 62 S. Ct. 15-20.)

The court looks to the essential purpose of the bill in determining jurisdiction. *(Kelleam* v. *Maryland Casualty Co., et al.,* 312 U. S. 377, 61 S. Ct. 595.) At the outset, under the pleadings and admitted facts it is clear that the United States seeks to protect no right, nor alleges the invasion of any of its property rights. The sole purpose is to adjudicate rights or controversies between interveners, the Executor

and Administrators of Estates of two deceased Osage Indian wards and the Guardian of one Indian ward on the one side, and petitioner on the other, the subject-matter being real and personal property in which, under the facts and applicable law hereinafter stated petitioner has a vested interest by operation of law as the surviving wife, and said interest is unrestricted and free from government control.

The jurisdiction of the Federal Court to entertain this litigation, if sustained, must be under and by virtue of 36 Stat. 1091, 28 U. S. C., Sec. 41 (1) (Appendix 30), 28 U. S. C. A., Sec. 41 (1), which reads in part as follows:

> "The district courts shall have original jurisdiction as follows: First, of all suits of a civil nature, at common law or in equity, brought by the United States."

The above statute is very similar to the statute conferring original jurisdiction of certain controversies upon the Supreme Court of the United States, (Jud. Code, Title 28, U. S. C. A., Sec. 233, Stat. 1156) which reads in part as follows:

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, etc."

The decisions of this court, in considering the jurisdiction of the national courts over a particular subject-matter under one of said statutes, have cited cases construing the other statute.

The right of the United States to maintain an action in its own behalf or for the use and benefit of third persons, including Indian wards, has been considered by this court in many decisions. The decisions are uniform in holding: The right of the government to maintain such action depends up-

on the same principles which would authorize a private citizen to apply to a court of justice for relief. *(United States* v. *San Jacinto Tin Co.,* 125 U. S. 273-280, 8 S. Ct. 850-857.) Where the government has no pecuniary interest and the action is brought for use of third person, it must appear either by pleading or evidence that the government is under a duty or obligation to the third person relating to the particular subject-matter to maintain the action. *(United States* v. *San Jacinto Tin Co., supra; United States* v. *American Bell Tele. Co.,* 128 U. S. 319-325, 9 S. Ct. 90-97.)

The above principles, however technical, have been adhered to by the government in bringing an action for Indian wards and where proper allegations exist or are established as to the above requirements, the court has sustained the right of the government to maintain an action relating to restricted property but has denied the right as to unrestricted property. In *Heckman* v. *United States,* 224 U. S. 413, 32 S. Ct. 424, wherein the bill described the property or identified the same with particularity, deraigning a restricted title in the Indian ward, asserting federal restrictions against encumbrance or alienation by the ward and violation of said federal restrictions, and the duty of the government to protect the Indian against alienation or encumbrance made in violation of said federal restrictions, the right was sustained. In *United States* v. *Osage County,* 251 U. S. 128, 40 S. Ct. 100, wherein relief was sought against taxes levied on restricted land. Although the lands were taxable, they were restricted as to alienation, it being alleged the tax levy was illegal as made by systematic and intentional disregard of state laws to destroy the rights of a whole class of non-competent Indians created by the Act of Congress, the right was sustained. In *LaMott* v. *United States,* 254 U. S. 570, 41 S. Ct. 204, to enjoin persons not

members of the tribe from intentionally and persistently obtaining leases upon lands of Indians without the approval of Secretary of the Interior in violation of federal statutes, rules and regulations, this court sustained the right as to restricted property but modified the decree as to lands that were unrestricted. In *Cramer* v. *United States,* 261 U. S. 219, 43 S. Ct. 342, the right was sustained to cancel patents wrongfully issued upon lands occupied by Indians to the railroad, citing therein with approval *United States* v. *Gray,* 201 Fed. 291, which sustained the right of the government to maintain an action upon behalf of Indian wards in an action to recover damages for a breach of lease contract made upon restricted property with approval of Secretary of the Interior, or "to protect or enforce any other Indian property right which remains under the control and supervision of the Secretary of the Interior or the Indian Agent or his subordinates." Also citing *United States* v. *Fitzgerald,* 201 Fed. 295, holding the government may maintain an action to enforce and protect its governmental rights; or as in *Mott* v. *United States,* 283 U. S. 747, 51 S. Ct. 642, in an action to recover restricted funds that had been obtained from the government fraudulently; or as in *Barnett* v. *United States,* 82 F. (2d) 765, wherein the United States sought to enjoin Mrs. Barnett "to prevent the use of a fraudulent and void marriage certificate and ceremony as evidence in future dealings between the United States and Anna Laura Barnett;" or as in *United States* v. *Goat,* 224 U. S. 458, 32 S. Ct. 544, being an action by the government to quiet title and cancel deeds made by freedman wherein the court sustained the right to maintain the action as to deeds made in violation of governmental restrictions. However, the court dismissed the action as to conveyances or

encumbrances made by the allottee after restrictions were removed.

In all the above decisions, the underlying principle—the right of the government to maintain the action upon behalf of its Indian wards, and to confer jurisdiction on the federal court in the absence of diversity of citizenship has been limited to restricted property, and, if the subject-matter related to unrestricted property, the action has been dismissed.

The exactness with which the court has followed the above decisions in determining the jurisdiction of the courts by first ascertaining and determining whether the controversy relates to unrestricted lands or property is exemplified in *United States* v. *Bond,* 108 F. (2d) 504 (10 C. C. A.), and *United States* v. *Fixico,* 115 F. (2d) 389 (10 C. C. A.). See also *United States, ex rel. Warren,* v. *Ickes,* 73 F. (2d) 844 (U. S. Dist. Ct. A. D. C.), in a controversy relating to Creek Indians, holding "supervision of Secretary of Interior over royalties collected under lease held to automatically cease upon removal of restrictions through death of only surviving son of full-blood allottee terminating son's special estate."

In *United States* v. *Minnesota,* 270 U. S. 181, 46 S. Ct. 298, involving the statute conferring jurisdiction on this court in actions where the state was a party, and the right of the government to maintain an action against the state brought on behalf of Indians, this court held "it must be conceded that, if the Indians are the real parties in interest and the United States only a nominal party, the suit is not within this court's original jurisdiction." It then, with particularity, analyzed the bill which contained proper allegations that the lands involved were Indian lands and had

been unlawfully patented to the state, and the United States, by reason of treaties and statutes, sustained a relation to the Indians which it was entitled to protect, citing, among other cases, *Heckman* v. *United States, supra.*

In construing the same statute relating to the original jurisdiction of this court, the court in *United States* v. *State of West Virginia,* 295 U. S. 463, 471, 475, 55 S. Ct. 789, 792, 793, stated (p. 470): "Nor is it enough to sustain the jurisdiction in such a case that a state has been made a party defendant. The bill of complaint must also present a 'case' or 'controversy' to which the state is a party, and which is within the judicial power granted by the judiciary articles of the Constitution." The court (p. 470) further stated: "The bill in present suit neither asks the protection nor alleges the invasion of any property right of the United States" or asserts title to the property necessary to remove a cloud upon the title, and (p. 474) "General allegations that the state challenges the claim of the United States that the rivers are navigable and asserts a right superior to that of the United States to license their use for power production, raise an issue too vague and ill-defined to admit of judicial determination," holding that unless the bill alleges a justiciable controversy between the United States and the State of West Virginia, the cause was not within the original jurisdiction of the court and dismissed the action. The court in said case further held that the Declaratory Judgment Act of June 14, 1934, c. 512, 48 Stat. 955 (28 U. S. C. A., Sec. 400), does not alter the character of controversies which are subject to the judicial power of the United States.

In the case at bar the bill alleges no title in either the United States or the Indian wards essential to an action to

quiet title. (See *United States* v. *State of West Virginia, supra; Frost* v. *Spitley,* 121 U. S. 553, 7 S. Ct. 1129; *Dick* v. *Foraker,* 155 U. S. 404, 15 S. Ct. 124. The bill fails to allege that the subject-matter involved herein is restricted property, and, unless it can be so decreed under the admitted facts, the trial court was without jurisdiction.

We now look to the status of the property involved in this controversy to ascertain whether it is restricted or unrestricted.

1. *The descent of lands and moneys of decedent was controlled by the laws of the State of Oklahoma.*

In *Jefferson* v. *Fink,* 247 U. S. 288, 38 S. Ct. 516, 62 L. ed. 117, it is held that upon the advent of statehood, under the general policy of Congress in allotting lands, the descent of Indian land in Oklahoma was according to the laws of the State of Oklahoma. In *Jackson* v. *Harris,* 43 F. (2d) 513, it was held:

> "Congress making Oklahoma Statutes control devolution of estate of Indians in Oklahoma, did not adopt Oklahoma Statutes as federal law, but merely provided the devolution should be in accordance with local law. (Act of June 16, 1906, c. 3335, Secs. 13, 21, 34 Stat. 267; Act of May 27, 1908, c. 199, Sec. 9, 34 Stat. 312.)"

The lands and moneys having descended according to local laws of Oklahoma, we look to local laws to ascertain when title vested in heirs on death of decedent, and who are his heirs.

2. *Applicable State Statutes.* The Supreme Court of Oklahoma, in *Davis* v. *Morgan,* 186 Okl. 30, 95 P. (2d) 856, held as follows:

> "On the death of an intestate, the vesting of title to intestate's property in the heirs is immedate."

The heirs, under the facts as stipulated, (R. 49) are fixed and controlled by Title 84, Section 213, O. S. 1931, which read, in part, as follows:

> "If decedent leave no issue, the estate goes one-half to the surviving husband or wife * * * but if there be no father or mother, then said remaining one-half goes, in equal shares, to the brothers and sisters of decedent * * *."

Under this statute, upon the death of decedent, his estate vested, under said law, one-half in petitioner, and one-half in Ben Mashunkashey; Pah-pu-son-tsa and James G. Blaine were not heirs and inherited no interest therein.

3. *Interest that vested in petitioner was unrestricted under and by virtue of Section 6, of Act of April 18, 1912* (37 Stat. 86) *wherein it is provided:*

> "That from and after the approval of this act, the lands of deceased Osage allottees * * * when heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed."

Petitioner not being a member of the tribe, restrictions were removed as to the interest in the real estate that vested in her. That under Section 4 of the Act of March 3, 1921 (41 Stat. 1249), which provides:

> "That from and after the passage of this act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, * * *."

The funds in possession of the government and other personal property that vested in petitioner were unrestricted. (See *United States* v. *Mullendore,* 30 Fed. Supp. 13; *United States, ex rel. Warren,* v. *Ickes, supra.)*

It follows that under the facts above stated and the applicable law, the subject-matter involved in this controversy is the unrestricted interest in real and personal property that vested in the petitioner by operation of law, free from any supervision or control of the government, and, under the authorities heretofore cited, the Federal Court acquired no jurisdiction of the action by the government or on behalf of the Indian wards to divest her of that unrestricted title.

The opinion of the Court of Appeals concedes the Declaratory Judgment Act creates no new rights and the right of the government to maintain this action must be found in general law (R. 107). It cites *Heckman* v. *United States, supra* (R. 107). However, it overlooks the particularity it detailed the restrictions against alienation and the allegation the conveyance sought to be vacated was made in violation of those restrictions and the duty of the United States to protect the ward against conveyances made in violation thereof. No such facts are pleaded or established in case at bar, but, on the contrary, as to the release, the government established by evidence (R. 70) its only power in relation thereto was to approve or disapprove same. It follows that upon the approval of the instrument, in the absence of fraud or mistake, its duties and obligations ceased. Its jurisdiction over the funds delivered to administrators ceased in the absence of fraud or mistake. *(Hansen* v. *Hoffman,* (C. C. A. 10) 113 F. (2d) 780)

The opinion further cites *United States* v. *State of Min-*

nesota, supra. However, the court, in sustaining the right of the government to maintain the action alleged in the bill, asserted its duty and obligation to account to the Indians for lands or proceeds and that patents had been unlawfully issued to the state.

It further cites *McCarty* v. *Hollis, supra,* wherein the court held the government may maintain an appropriate action, but did not define "appropriate actions," except to cite *United States* v. *Heckman,* and similar cases.

The guardianship of the United States over Indian tribes is not a general guardianship, but is subject to the limitations inherent to such guardianship. *(United States* v. *Creek Nation,* 295 U. S. 103, 55 S. Ct. 681.) When applied to individual members, under the authorities heretofore cited, the guardianship only extends to restricted property or rights created under and based on some federal statute, and has no application to unrestricted property. *(LaMott* v. *United states, supra.)*

The Circuit Court of Appeals by its opinion has indirectly stricken down and held as surplusage all of the allegations and discussions in the opinions of the court in the above cases upholding the jurisdiction based on the theory the controversy related to restricted property and the duty of the government to protect Indians as to transactions made in violation of governmental restrictions. The opinion further, in support of jurisdiction (R. 107) cites *Strickland* v. *Peters,* (C. C. A. 5) 120 F. (2d) 53; *Eddy* v. *Eddy,* 168 Fed. 590. However, in both of those cases, the jurisdiction of the court was invoked by reason of diversity of citizenship which does not exist in the case at bar.

It is submitted that the Circuit Court of Appeals erred in holding the trial court had jurisdiction of the controversy,

and should have reversed the decision of the lower court with direction to dismiss for want of jurisdiction.

II.

On the Merits: If the court has no jurisdiction, the merits cannot be considered. The basis of government's action in the lower court to divest petitioner of her title was upon the theory of accord and satisfaction (R. 15) and the lower court so decreed (R. 41). However, in view of general law, 1 C. J. 527, that plea of accord and satisfaction has no application to method of acquiring property, this theory was not adopted by circuit court of appeals.

The tenure, transfer, control, acquisition and disposition of real property are matters which rest exclusively with the state where property lies. (*United States* v. *Fox,* 94 U. S. 315-320-321, 24 L. ed. 192; *Sunderland* v. *United States,* 266 U. S. 226-233, 45 S. Ct. 64) The method of acquiring real property in Oklahoma is regulated by statute, Title 60, Sec. 331, O. S. 1941, which reads as follows: "Property is acquired by *(1)* Occupancy; *(2)* Accession; *(3)* Transfer; *(4)* Will; or *(5)* Succession." To this may be added, to enforce right in court of equity, as specific performance or estoppel. The bill neither alleges nor asserts acquisition of the interest that vested in petitioner by Indian wards in any statutory manner. It is not contended the instrument was sufficient to constitute a conveyance or assignment. In the absence of proper allegation of superior title, or facts upon which to base superior title, the petition fails to state facts to support a judgment to quiet title. (*United States* v. *West Virginia, supra; Dick* v. *Foraker,* 155 U. S. 404, 15 S. Ct. 124; *Frost* v. *Spitley,* 121 U. S. 533, 7 S. Ct. 1129; *Smith* v. *Reneau,* 188 Okl. 629, 112 P. (2d) 160.)

The petitioner did not execute the instrument. It is

fundamental that an attorney employed to have a will approved (R. 37-38) before the Secretary of Interior has no authority to barter away property that vested in petitioner by operation of law, and the execution of the instrument denominated "Release" (R. 16) was not within the scope of the attorney's employment. *(Marlsbough* v. *Smith,* 11 Kan. 554; *Hamberger* v. *White,* 54 Okl. 736, 154 Pac. 576; *Scott* v. *Moore,* 52 Okl. 200, 152 Pac. 823)

The letter of petitioner to Mr. Hook, page 50, and the language therein "to settle my claim in and to the above estate" clearly has application to the claim for which said attorney was employed, to-wit: The approval of the will, and related to that subject-matter.

It is further fundamental: The court will not extend an instrument in settlement between heirs of interest in an estate to include property not incorporated therein in the absence of fraud or mistake. *(Riffe* v. *Walton,* 105 Kan. 227, 182 Pac. 640, 6 A. L. R. 549, Annotations 565)

Clearly the language "a settlement or waiver of 'claims against an estate," is not synonymous with nor does it include property that vests in an heir by operation or law, nor does it constitute a conveyance or assignment of said property.

The manner of conveyance of real estate or an interest therein is regulated in Oklahoma by statute, being Title 16, Section 4, O. S. 1941, copied in appendix herein, page 30.

An instrument affecting real estate made by attorney in fact is regulated by Title 16, Sections 3 and 20, O. S. 1941, copied in appendix herein, page 31.

The force and effect of these statutes have been construed by the Supreme Court of Oklahoma in *Herron* v. *Harbour,* 75 Okl. 127, 182 Pac. 243; *Soders* v. *Armstrong,* 172

Okl. 50, 44 P. (2d) 868, held that there must be a formal declaration or admission before officer authorized to take acknowledgment by the person who has executed the instrument before the power of attorney is sufficient.

The only authority Mr. Hook had was by virtue of the letter, (R. 50) which while signed was not sufficient in form nor properly executed so as to confer on Mr. Hook, as an attorney in fact for petitioner, authority to execute conveyances to real estate that vested in petitioner by operation of law upon the death of her deceased husband.

III.

The Application and Validity of Section 7 of the Act of Congress of February 27, 1925 (43 Stat. 1008): The Bill (R. 13) refers to the above section of the statute pleaded by the Indian wards as a defense in the County Court that petitioner was precluded from inheriting for the reason she was not of Indian blood. However, the Bill asserts no right by virtue of said statute. Petitioner denied the statute had any application to individual property of deceased Osage Indians, or, if so, contended that Congress was without power to pass legislation affecting titles already granted under previous allotment acts or to deprive decedent of the benefits of the laws of the state regulating descent of his individual property (R. 34-35).

The Circuit Court of Appeals in its opinion apparently does not base its opinion on said Congressional Act. However, it refers to the fact that the state District Court on appeal of heirship had decreed petitioner was not of Indian blood and therefore not an heir, and that an appeal was pending in the Supreme Court of Oklahoma (R. 106). It is not clear whether the Court of Appeals gave consideration

to said fact; however, it is proper to advise this court that the Supreme Court of Oklahoma has construed said statute as applicable herein, but that steps are now being taken to have said decision reviewed by this court.

Section 7 of the above statute reads as follows:

> "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians *any right, title or interest to any restricted lands, moneys or mineral interests of the Osage Tribe:* Provided, that this section shall not apply to spouses under existing marriages." (Italics ours.)

The construction and application of every statute presents a problem in which words such as in the above statute, "any right, title or interest to any restricted lands, moneys or mineral interests of the Osage Tribe" derive validity from the aim and nature of the specific legislation. In ascertaining the scope of Congressional Legislation a due regard for a proper adjustment of the local and national interest in our federal scheme must always be in the background and no statute should be construed to radiate beyond the obvious meaning of the language, unless otherwise the purpose of the act would be defeated. *(Federal Trade Commission* v. *Bunte Bros.,* 312 U. S. 349, 61 S. Ct. 580.)

The Osage Tribe of Indians, as a tribe, possess and own certain lands exempt from allotment under Section 2 of the Osage Allotment Act (34 Stat. 539) and under Section 3 there is reserved the mineral rights. This title, however, is a communal title, no individual owning any interest in a separate tract. *(United States* v. *Sandoval,* 231 U. S. 28-35, 34 S. Ct. 1-6)

The individual members of the Osage Tribe own in

severalty their individual property, irrespective of whether competent or incompetent. Those without certificates of competency often own and possess *(a)* property free from governmental control; *(b)* property restricted to the extent owner cannot alienate and encumber same without consent of the Secretary of the Interior. *(LaMott* v. *United States, supra).* The descent of these two classes of individual property of Indians deceased since statehood, under Section 6 of the Osage Allotment Act, *supra,* which reads as follows:

> "That the lands, moneys and mineral interests herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs according to the laws of the Territory of Oklahoma, or of the state in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys and mineral interests must go to the mother and father equally,"

is regulated and controlled by the laws of the State of Oklahoma. *(Jefferson* v. *Fink, supra; Jackson* v. *Harris, supra.)*

This court, in *Jefferson* v. *Fink,* held the purpose of the provisions of the Enabling Act was to admit Oklahoma into the Union with a set of laws uniform throughout the state, and by such provisions it was the intent or purpose that the descent of individual property of all Indians deceased since statehood should be in accordance with state laws. Congress by the Enabling Act and the Allotment Act, *supra,* in adjustment of local and national interest provided the descent of property of Indians was of local concern and of state cognizance in accordance with general law. *(Cope* v. *Cope,* 137 U. S. 682, 11 S. Ct. 222, recognized in *Sunderland* v. *United States,* 266 U. S. 226, 45 S. Ct. 64.) The individual members

had no interest in tribal property that passed by succession, except rights referred to as "headrights." *(Globe Indemnity Company* v. *Bruce,* 81 F. (2d) 143.) The right to regulate the alienation or encumbrance of property designated as restricted was of national concern by reason of the government's guardianship, and was reserved to Congress.

It is a cardinal rule in the construction of statutes that a new statute of a fragmentary nature must be construed as intended to fit harmoniously into the existing system unless a contrary legislative purpose is plainly indicated. *(United States* v. *Barnes,* 222 U. S. 513, 32 S. Ct. 117; *Gay* v. *Ruff,* 292 U. S. 25, 54 S. Ct. 608, 92 A. L. R. 970.) Under the harmonious system existing prior to the enactment of this statute, the Congress has evidenced an intent since the general allotment Act of 1887 to provide that the descent of land should be according to local law. *(Jefferson* v. *Fink, supra.)* Clearly, there is no language in this act that plainly indicates an intent to depart from that system which had been consistently followed by Congress.

It is a further fundamental rule of law that repeals by implication are not favored and none will be inferred unless the intent is clear and manifest. *(United States* v. *Burroughs,* 289 U. S. 159, 53 S. Ct. 574; *Washington* v. *Miller,* 235 U. S. 422, 35 S. Ct. 119; *Cope* v. *Cope,* 137 U. S. 682, 11 S. Ct. 222; *United States* v. *Borden Co.,* 308 U. S. 182, 60 S. Ct. 182)

The Act of February 27, 1925, *supra,* contains no repealing clause and clearly there is no intent to repeal the provisions of Section 6 of the Osage Allotment Act, *supra,* providing that the lands shall descend according to the laws of the State of Oklahoma, nor to repeal the provisions of Sections 13 and 21 of the Enabling Act, *supra,* regulating

the laws of descent, which congress intended, as held in *Jefferson* v. *Fink, supra,* to regulate the descent of property of Indians deceased since statehood.

Clearly Congress by using the language "lands, moneys and mineral interests of the Osage tribe" did not intend same to be synonymous with the individual property of the members of the tribe but, as the language imports, intended that it relate to tribal property should the same thereafter be distributed. True, in *Washington* v. *Miller, supra,* in construing a proviso to Section 6 of the Supplemental Creek Agreement, the court held that the use of the term "lands of the Creek Nation" related to the individual allotments. However, at the time of the passage of the act, all lands were those of the Creek Nation. This is far from holding that an Act of Congress which is passed more than fifteen years after the rigths of the individual Indian became vested with a fee simple title, in referring to that land would refer to it as the "lands of the Osage Tribe of Indians." In the instant case the pleadings disclose there is land involved which is located in Tulsa, Oklahoma—no part of Osage Nation and never was. To extend this language to include individual property of the Indian or to include property purchased which had never belonged to the Osage Tribe is contrary to fundamental rules of construction.

The Power of Congress. The several states of the Union possess the power to regulate the descent of real and personal property within their respective limits. *(United States* v. *Fox,* 94 U. S. 315, 24 L. ed. 193; *Cope* v. *Cope, supra; Sunderland* v. *United States, supra.)*

Upon admission of a state into the Union, "Congressional regulations in an enabling act which a state is required to and does assent to as a condition to admission

into the Union remain in force after such admission if, and only if, the subject is one within the regulating power of Congress." *(United States* v. *Sandoval, supra.)*

On admission of Oklahoma into the Union under the Enabling Act *(supra)* with the same power and authority as the original states, Congress reserved no power to pass local laws or amend the laws of the state. *(Coyle* v. *Smith, Sec'y of State,* 221 U. S. 559, 31 S. Ct. 688; *South Carolina* v. *United States,* 199 U. S. 439, 26 S. Ct. 110; *Butler* v. *United States,* 297 U. S. 1, 56 S. Ct. 312; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 56 S. Ct. 855.)

The laws of descent and distribution of property being local laws *(Jefferson* v. *Fink, supra)* Congress is without power to repeal or amend the laws of the State of Oklahoma regulating the descent and distribution of property of Indians which had been delegated to the state under and by virtue of the Osage Allotment Act and the Enabling Act. It would seem clear that Congress, after the admission of Oklahoma into the Union in 1907, had no authority in 1925 to regulate or control individual property of Osage Indians which had been delegated to the state under the Enabling Act and Osage Allotment Act.

If this statute should be applicable to the individual property of the Indian, it being an exception to the general rule of descent and distribution, the burden is upon the United States to show not only its applicability but the petitioner is not of Indian blood. *(United States* v. *Cook,* 17 Wall. 168, 21 L. ed. 536; *Schlemmer* v. *Buffalo, Rochester & Pittsburgh Ry. Co.,* 205 U. S. 1, 27 S. Ct. 407; *United States* v. *King & Howe,* 78 F. (2d) 693.)

IV.

The Writ of Certiorari Should Issue. From the record it is clear that the District Court was without jurisdiction of the subject-matter, being a local controversy solely between citizens of the state. The subject-matter related to the unrestricted interest in real and personal property that vested in petitioner by operation of law on the death of her deceased husband. The Circuit Court erred in holding the Federal Court had jurisdiction of said subject-matter and controversy.

If the opinion of the Circuit Court is permitted to stand and the jurisdiction of the federal court is extended to include all controversies relating to property of an Indian, irrespective of whether it is restricted or unrestricted, a flood-gate is opened for a new and different type of litigation in Federal Courts—all suits the United States might seek to maintain relating to property of Indians over which it has no control or supervision—.

The question of jurisdiction of the Federal Court over such controversies is of general importance. The right to the writ is fully supported by the cases heretofore cited.

Respectfully submitted

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